(1) Supreme Court, U.S.
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NO. _____

In The

Supreme Court of the United States

October Term, 2000

WILLIAM DEAN WARE,

Petitioner,

versus

STATE OF TENNESSEE,

Respondent

Petition For A Writ of Certiorari
To the Tennessee Supreme Court

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE SEARCH WARRANT OBTAINED GENUINELY INDEPENDENTLY AND WHOLLY ASIDE AND APART FROM THE STATE'S INITIAL ILLEGAL ENTRY OF PETITONER'S RESIDENCE AND CURTILAGE?

II. DID PETITIONER HAVE A LEGITIMATE EXPECTATION OF PRIVACY THAT WAS INVADED BY THE STATE'S SEARCH OF THE MORGAN RESIDENCE?

III. WAS THE STATE OFFICER REQUIRED TO DISCONTINUE HIS SEARCH AFTER LEARNING THE MORGAN RESIDNECE WAS NOT PART OF THE PROPERTY DESCRIBED IN THE SEARCH WARRANT?

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CITATIONS OF THE OPINION AND ORDERS ENTERED IN THIS CASE

STATE v. WARE, TN C.C.A. No. 01C01-9803-CC-00129 (June 11, 1999, at Nashville) (memorandum opinion)

STATE v. WARE, TN C.C.A. No. 01C01-9803-CC-00129 (June 11, 1999, at Nashville) (judgment affirming trial court)

STATE v. WARE, TN C.C.A. No. 01C01-9803-CC-00129 (Nov. 1, 1999 at Nashville) (Supreme Court per curiam order denying permission to appeal)

STATEMENT OF JURISDICTION

DATE JUDGMENT ENTERED. The Tennessee Supreme Court denied Petitioner's application for permission to appeal on November 1, 1999.

STATUTORY PROVISIONS CONFERRING JURISDICTION. This Court has jurisdiction to hear this cause pursuant to 28 U.S.C. § 1257(a). This cause is an appeal of a final judgment rendered by the highest court in Tennessee in which a decision could be had (the Tennessee Supreme Court having denied Petitioner permission to appeal) where Petitioner's rights under the Fourth Amendment to the Untied States Constitution have been violated.

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUION OF THE UNITED STATES
AMENDMENT 4

Unreasonable searches and seizures. - The right of the people to be secure in their person, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched, and the person or thing to be seized.

STATEMENT OF THE CASE

FACTS

The following recitation of the facts is taken verbatim from the decision of the Tennessee Court of Criminal Appeals decision:

Around noon on September 29, 1994, Trooper Dennis Peevehouse of the Tennessee Highway Patrol and Agent Jim Lawson of the Tennessee Alcoholic Beverage Commission were flying in a helicopter over rural Wayne County in a search for marijuana. While they were flying above Appellants' property at an altitude of approximately 900 feet, Peevehouse saw rows of plants that were covered by a white cheesecloth-type material. At one end of a row, Peevehouse saw that part of the cloth had blown back and exposed what he recognized through training and experience as a marijuana plant. Lawson could also see what he recognized as marijuana plants touching the cheesecloth.

After spotting the marijuana, Peevehouse followed standard procedure and took the helicopter down to an altitude of 300 feet so that he could confirm his observation. Peevehouse and Lawson then radioed some officers that were on the ground several miles away and directed them to

Appellants' property. The officers on the ground arrived at Appellants' property approximately ten minutes later and parked in both driveways leading to the residence.

When the officers arrived at Appellants' residence, they followed standard procedure and some officers moved to surround the house while others approached the residence to request consent for a search. When Agent Bond Tubbs went toward the back of the residence on the left, he observed a marijuana patch covered with cheesecloth. Tubbs did not touch the cloth or move it, but he could see through it and could recognize the marijuana plants growing underneath. Tubbs then reported on the radio that he had seen marijuana.

When some other officers approached the residence, they encountered Appellants' daughter, Summer Ware, who was leaving the residence in what appeared to be a hurry. The officers then identified themselves, and Summer stated that her mother was at home. The officers then allowed Summer to enter the residence to secure a dog, and they then asked her to open the door. She complied, and the officers entered the residence.

Upon entering the residence, the officers encountered Ms. Ware and they asked her for consent to search. Ms. Ware refused and told the officers to leave the property. The officers then secured the scene by blocking all exits to the

residence and checking the other rooms for any other individuals who might be in the home. Shortly thereafter, the officers located Mr. Ware walking down the road. The officers then arrested both Appellants and Summer Ware.

Lawson and Agent Barry Callahan then prepared an affidavit based on the observations of Peevehouse and took the affidavit to a magistrate to obtain a search warrant. When they returned, the officers began a search of Appellants' residence, outbuildings, and the surrounding gardens and fields.

The search of Appellant's property also included a search of a building owned by Appellants' neighbor, Jeff Morgan, who allowed Appellants to use the building in return for watching the building while he was gone.

During the search of the Appellants' property and Morgan's building, the officers found numerous items associated with the cultivation of marijuana, $990.75 in coins, twenty-two firearms, a video camera, two videotapes showing marijuana cultivation, assorted gold and silver coins, silver bars, 153 marijuana plants, and a container with LSD in it.

PROCEDURAL HISTORY

Petitioner was indicated in the Circuit Court for Wayne County, Tennessee in February, 1995 for

manufacturing a Schedule VI controlled substance and manufacture of a Schedule I controlled substance (Transcript of the Record, Vol. I, pp. 7-12). Petitioner moved to suppress all evidence seized from his residence and his adjoining neighbor's house because of violations of the his rights against unreasonable searches and seizures under the state and federal constitutions (Supp. Rec., pp. 6-7).

The Motion to Suppress was heard on July 3, 1996 (Transcript of Hearing on Motion To Suppress). In a letter opinion filed August 15, 1996, the trial court found Petitioner's constitutional guarantees had not been violated by the search, and there would be no suppression of those items seized with the search warrant (Supp. Rec., p. 11). Petitioner then asked the Court to address the search of the neighbor's home where the Schedule I controlled substance was found (Supp. Rec., p. 12). The Court subsequently entered an order on the search issues, resolving all issues but standing against the Petitioner Ware (Supp. Rec., p. 13).

Petitioner entered guilty pleas pursuant to T.R.Cr.P. 37(b)(2)(i) on August 13, 1997 (Supp. Rec., pp. 14-15) and he received a sentence of eight (8) years in case number 105832 in the Department of Correction for the amended charge of Possession of a Scheduled I Controlled Substance for Resale—to serve one year, day for day (Transcipt of the Record, Vol. I, p. 23)—and a concurrent sentence of two (2)

years (seven months to be served) in case number 10583 for Possession of Schedule VI for Resale (Id. p. 24). Mr. Ware was fined a total of $7,000.00 (Id. pp. 23-24).

Petitioner timely appealed the certified issues. The issue of his "standing" (his legitimate expectation of privacy) was not certified as an issue and was conceded and even urged by the State of Tennessee throughout the appellate process (Brief of State, pp. 19-20).

The Tennessee Court of Criminal Appeals held the initial illegal entry upon and into Petitioner's residence was harmless "because the warrant was obtained without any reference to evidence uncovered during the initial entry, because the evidence was subsequently discovered during the execution of a lawful warrant, and because the police would have obtained the warrant even if they had not made the initial entry." State v. Ware, TN C.C.A. 01C01-9803-CC-00129 (June 11, 1999, at Nashville) (slip opinion at p. 13).

As to the search of the Morgan residence where the LSD was found, the Court of Criminal Appeals held Petitioner had no reasonable expectation of privacy in the building (Id., slip op. at p. 15). Alternatively, the Court found (in a footnote) that the search of the Morgan property was reasonable because the agent "believed it was part of their (the Wares') property or at least was connected with it" (Id. at footnote 9).

Petitioner's timely application for permission to appeal to the Tennessee Supreme Court was denied on November 1, 1999. No rehearing was sought.

STAGE WHERE FEDERAL QUESTIONS FIRST RAISED, METHOD, MANNER, AND HOW DISPOSED OF. The issue of the illegality of the search and seizure in question under federal law was first raised during the hearing on Petitioner's oral Motion to Suppress, held July 3, 1996 in the Circuit court for Wayne County, Tennessee (Transcript of Suppression Hearing, pp. 168-174). Petitioner also expressly relied upon the protections guaranteed by the Fourth Amendment to the Untied States Constitution in his written Motion to Suppress filed July 12, 1996 (Supplemental Motion to Suppress, Supp. Rec. pp. 6-7), and the State of Tennessee cited federal caselaw in its response filed July 24, 1996 (Response to Motion to Suppress, Supp. Rec. pp. 8-9). The trial court relied upon both federal and state precedent in denying Petitioner's Motion to Suppress (Court's letter of August 14, 1996, Supp. Rec. p. 11). The trial court's order certifying the issues for appellate review under Tennessee Rule of Criminal Procedure 37(b)(2)(i) identified those issues as "all alleging violations of these defendants' guarantees against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and analogous

provisions of the Tennessee Constitution." (Order of October 9, 1997, Supp. Rec. p. 13).

ARGUMENT

This Court should grant a *writ of certiorari* because the Tennessee courts have decided not one, but three, important questions of federal law in ways that conflict with relevant decisions of this Court. The most troubling aspect of these constitutional violations is that they occurred as part of the Government's Task Force for the Eradication of Marijuana's "Standard Operating Procedures."

I. WAS THE SEARCH WARRANT OBTAINED GENUINELY INDEPENDENTLY AND WHOLLY ASIDE AND APART FROM THE STATE'S INITIAL ILLEGAL ENTRY OF PETITIONER'S RESIDENCE AND CURTILAGE?

The Tennessee Court of Criminal Appeals concluded the evidence seized with a warrant in the second entry of the Ware residence was legal because the warrant was issued based solely on the observations of Peevehouse that were completely independent of anything observed by officers on the ground, deigning to discuss the role of the officer's initial illegal entry in their decision to procure the subsequent warrant. There is no evidence of any intention by the officers

to obtain the warrant if they had not made the initial entry. The trial court made no such finding of fact. Actually, the State's witnesses each testified the decision to procure a search warrant was not made until after the initial, illegal entry (Transcript of Suppression Hearing: Agent Peevehouse, p. 14; Agent Callahan, pp. 64, 88; Agent Lawson, pp. 101-102, 118-119). All of the same State agents (and witnesses) testified that one of the agents (Agent Tubbs) confirmed via radio the presence of marijuana during the initial entry (Id. Agent Peevehouse, pp. 11-12, 35-36, 163-165; Agent Tubbs, pp. 53-54, 56-62; Agent Callahan, pp. 81-83, 161-162; Agent Lawson, pp. 106-111).

These facts are strikingly similar to those of Murray v. U.S., 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), where this Court remanded the cause to the district court after the First Circuit Court of Appeals—in an act of literary largess similar to the liberties taken by the Tennessee Court of Criminal Appeals—summarily concluded that no causal link existed between the initial illegal search and the issuance of the subsequent search warrant, despite the absence of the factual findings by the trial court to support such a conclusion. Murray, supra, 487 U.S. at 543. The case against such an inference—that the initial illegal entry provided no impetus to secure a warrant—is even stronger in the case at bar, where every State witness asked told the trial

court the decision to seek a search warrant was not made until after the agents had entered the Ware curtilage and home—after the agents had confirmed marijuana was on the premises, and lots of it.

Petitioner submits the holding of Murray leaves no alternative but to reverse the decisions upholding the search warrant in the case and vacate the convictions herein.

II. DID PETITIONER HAVE A LEGITIMATE EXPECTATION OF PRIVACY THAT WAS INVADED BY THE STATE'S SEARCH OF THE MORGAN RESIDENCE?

The Tennessee appellate courts, sua sponte, decided Petitioner had no legitimate expectation of privacy in the Morgan residence. This was after the trial court implied he did ("the search of residence, and curtilage, including the building owned by a Mr. Morgan but used by the Wares, was valid") (Order of March 4, 1997, Supp. Rec. p. 13).

This was after the trial court certified the issues for appeal—and never mentioned "standing" or Petitioner's expectations of privacy as an issue. (Order of Oct. 9, 1998, Supp. Rec. pp. 14-15).

This was after the State argued

> "In this case, the storage house was occupied and apparently did not contain property of anyone other than the Ware family. Thus, the search did not

> intrude upon the privacy interest of anyone other than the Wares."
>
> Brief of State of Tennessee, filed Sept. 22, 1998, p. 21

The Court of Criminal Appeals weighed the various factors as follows:

"This Court has held that the following seven factors are applicable to the standing inquiry:

> (1) property ownership;
> (2) whether the defendant has a possessory interest in the things seized;
> (3) whether the defendant has a possessory interest in the place searched;
> (4) whether he has a right to exclude others from that place;
> (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion;
> (6) whether he took normal precautions to maintain his privacy; and
> (7) whether he was legitimately on the premises.

State v. Oody, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991) (quoting United States v.Haydel, 649 F.2d 1152, 1154-55 (5th Cir. 1981)).

In reviewing the applicable factors, we conclude that Appellants failed to establish that they had a reasonable expectation of privacy in Morgan's building. It is true that Appellants had a possessory interest in Morgan's building and they were legitimately entitled to use the building.

Indeed, Ms. Ware testified that Morgan had given Appellants permission to use the building for storage in return for keeping the building in repair. It is also true that Appellants had manifested a subjective expectation that the building would remain free from governmental invasion and had taken normal precautions to maintain their privacy by keeping the building locked. However, we conclude that those factors are outweighed by the other factors which indicate that Appellants had no legitimate expectation of privacy in Morgan's building. First, it is undisputed that Morgan, and not Appellants, owned the building, In fact, Appellants did not have a lease or any other kind of written agreement that entitled them to use the property; their use was merely pursuant to a verbal agreement. Second, there is no indication in the record that Appellants over claimed ownership of the property that was seized from Morgan's building. In fact, Ms. Ware specifically testified that she did not know who owned the marijuana growing equipment or the LSD that was found In the building. Third, and most importantly, there is no indication in the record that Appellants had the right to exclude others from Morgan's building. There is no indication that Appellants' agreement with Morgan gave them the exclusive right to use the building. Certainly, the record indicates that Morgan had a key to the building and nothing indicates that he could not

have used the building anytime he was in the area. Further, there is nothing in the record to indicate that Morgan could not have given his key to any number of people and also permitted them to use the building for storage. Under these circumstances, we conclude that Appellants did not have a legitimate expectation of privacy in Morgan's building.

> State v. Ware, TN C.C.A. No. 01C01-9803-CC-00129 (June 11, 1999, at Nashville), slip. op. at pp. 14-16.

Petitioner simply submits that under the correct test for his expectation of privacy as developed in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); and U.S. v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 99 L.Ed.2d 59 (1951), he did have a legitimate expectation of privacy in the Morgan building. How is the Morgan building any different from Jeffers' aunts' hotel room, to which Jeffers had been given a key? How is Jeffers' key different from the key given to Petitioner by Mr. Morgan?

Petitioner is entitled to object to the search of the Morgan residence; his privacy was invaded thereby.

III. WAS THE STATE OFFICER REQUIRED TO DISCONTINUE HIS SEARCH AFTER LEARNING THE MORGAN RESIDNECE WAS NOT PART OF THE PROPERTY DESCRIBED IN THE SEARCH WARRANT?

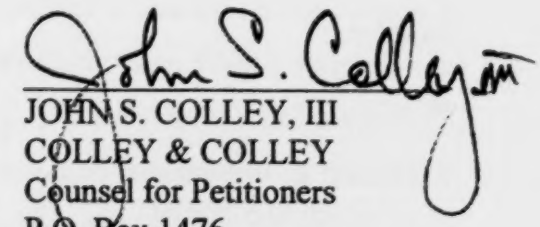
Probably the most blatant and egregious constitutional violation committed by the State agents was kicking in the door to the Morgan residence after being informed by a local law enforcement officer that the building was not owned by the Petitioner and his family (Transcript of Suppression Hearing, pp. 121-124). Common sense and decency, and Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) demand condemnation of such an act: isn't this the very type of act the Fourth Amendment warrant requirements were meant to prevent?

As Garrison taught us, the officer was required to discontinue his search as soon as he was "put on notice of the risk" that he "might be" in a residence (or "unit") erroneously included within the terms of the warrant. Garrison, supra, 480 U.S. at 87. If the officer had known, or should have known, that the Morgan building was not Ware property before he entered it, he would have been obligated to limit his search to Ware property—and not kick in the locked front door to the Morgan residence. Id. 480 U.S. at 86.

The officer's mistake was not one of the "honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." Id. 48 U.S. 87. To the contrary, all the Wares had been taken to jail; their residence was a football field away through the woods; and the Moran building was

unoccupied that day (Transcript of Supp. Hearing, pp. 117, 124). This officer simply ignored the local officer and kicked in the door. Will this Court stand idly by while such actions are approved by the Tennessee judicial system?

This the 31st day of January, 2000.



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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
JANUARY SESSION, 1999

STATE OF TENNESSEE,	)	C.C.A. NO. O1C01-9803-CC-00129
Appellee,	)	
	)	WAYNE COUNTY
vs.	)	
	)	HON. WILLIAM B. CAIN
WILLIAM D. WARE and VIRGINIA WARE,	)	JUDGE
Appellant.	)	
	)	(Direct Appeal)

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OPINION FILED

JUN 11 1999

AFFIRMED
JERRY L. SMITH

OPINION

In February of 1995, the Wayne County Grand Jury indicted Appellants William D. Ware and Virginia Ware for manufacture of marijuana and also indicted Mr. Ware for manufacture of LSD. Appellants subsequently filed a motion to suppress all evidence that was seized from their property and from an adjoining neighbors property by the police on September 29 and 30, 1994.[1] The trial court conducted a hearing on the motion to suppress on July 3, 1996. Appellants then filed a supplemental motion to suppress on July 12, 1996. By letter dated August 14, 1996, the trial court denied the motion to suppress. On August 15, 1996, Appellants asked the trial court to address the search of the adjoining neighbors property where the LSD was found. The trial court subsequently entered an order on March 4, 1997, that denied the motion to suppress in its entirety. Appellants pled guilty to the above charges on August 13, 1997. That same day, the trial court sentenced Mr. Ware to a term of eight years for the LSD conviction, with one year of confinement followed by seven years of probation. The trial court also sentenced Ms. Ware to two years of probation for the marijuana conviction. After a sentencing hearing on October 9, 1997, the trial court sentenced Mr. Ware to a term of two years for the marijuana conviction, with seven months of confinement followed by one year and five months of probation. Both Appellants challenge their convictions and Mr. Ware challenges his sentence for the marijuana conviction, raising the following issues:

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[1]This motion does not appear in the record.

1) whether the helicopter surveillance of their property from an altitude of 300 feet violated Appellants' constitutional rights;

2) whether the search warrant was tainted by an earlier warrantless entry onto Appellants' property;

3) whether the search of an adjoining neighbors property violated Appellants' rights; and

4) whether the trial court should have imposed full probation for the sentence for Mr. Ware's marijuana conviction.

After a review of the record, we affirm the judgment of the trial court.

1. FACTS

Around noon on September 29, 1994, Trooper Dennis Peevehouse of the Tennessee Highway Patrol and Agent Jim Lawson of the Tennessee Alcoholic Beverage Commission were flying in a helicopter over rural Wayne County in a search for marijuana. While they were flying above Appellant's property" at an altitude of approximately 900 feet, Peevehouse saw rows of plants that were covered by a white cheesecloth-type material. At one end of a row, Peevehouse saw that part of the cloth had blown back and exposed what he recognized through training and experience as a marijuana plant. Lawson could also see what he recognized as marijuana plants touching the cheesecloth.

After spotting the marijuana, Peevehouse followed standard procedure and took the helicopter down to an altitude of 300 feet so that he could confirm his observation. Peevehouse and Lawson then radioed some officers that were on the ground several miles away and directed them to Appellants' property. The officers on the ground arrived at Appellants' property

approximately ten minutes later and parked in both driveways leading to the residence.

When the officers arrived at Appellants' residence, they followed standard procedure and some officers moved to surround the house while others approached the residence to request consent for a search. When Agent Bond Tubbs went toward the back of the residence on the left, he observed a marijuana patch covered with cheesecloth. Tubbs did not touch the cloth or move it, but he could see through it and could recognize the marijuana plants growing underneath. Tubbs then reported on the radio that he had seen marijuana.

When some other officers approached the residence, they encountered Appellants' daughter, Summer Ware, who was leaving the residence in what appeared to be a hurry. The officers then identified themselves, and Summer stated that her mother was at home. The officers then allowed Summer to enter the residence to secure a dog, and they then asked her to open the door. She complied, and the officers entered the residence.

Upon entering the residence, the officers encountered Ms. Ware and they asked her for consent to search. Ms. Ware refused and told the officers to leave the property. The officers then secured the scene by blocking all exits to the residence and checking the other rooms for any other individuals who might be in the home. Shortly thereafter, the officers located Mr. Ware walking down the road. The officers then arrested both Appellants and Summer Ware.

Lawson and Agent Barry Callahan then prepared an affidavit based on the observations of Peevehouse and took the affidavit to a magistrate to obtain a search warrant. When they

returned, the officers began a search of Appellants' residence, outbuildings, and the surrounding gardens and fields.

The search of Appellants' property also included a search of a building owned by Appellants' neighbor, Jeff Morgan, who allowed Appellants to use the building in return for watching the building while he was gone.

During the search of Appellants' property and Morgan's building, the officers found numerous items associated with the cultivation of marijuana, $990.75 in coins, twenty-two firearms, a video camera, two videotapes showing marijuana cultivation, assorted gold and silver coins, silver bars, 153 marijuana plants, and a container with LSD in it.

II. HELICOPTER SURVEILLANCE

Appellants contend that the helicopter surveillance of their property from an altitude of 300 feet violated their constitutional right to be protected from unreasonable searches.[2] We disagree.

The United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." U.S. Const. amend. IV. The Tennessee Constitution similarly provides "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures..."Tenn. Const. art 1, § 7. The touchstone of unreasonable search and seizure analysis is "whether a person has a "constitutionally

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[2]Appellants have not challenged the constitutionality of the helicopter surveillance of their property from an altitude of 900 feet.

protected reasonable expectation of privacy." State v. Bowling, 867 S.W.2d 338, 341 (Tenn. Crim. App. 1993) (quoting California v. Giraolo, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986)). This determination involves a two-part inquiry. First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? Bowling, 867 S.W.2d at 341 (citing Ciraolo, 476 U.S. at 211, 106 S.Ct. at 1811). In this case, there is no real dispute that Appellants had manifested a subjective expectation of privacy in the property viewed from helicopter. Thus, the determinative question is whether that expectation of privacy is one that society is willing to recognize as reasonable.

In Ciraolo, the United States Supreme Court held that it was unreasonable for the defendant to expect that marijuana growing in his fenced-in back yard was protected by the Fourth Amendment from aerial observation at an altitude of 1,000 feet. 476 U.S. at 213-15, 106 S.Ct. at 1813-14. The Court emphasized that the observations by the officers took place within public navigable air space in a physically non-intrusive manner. Id., 476 U.S. at 213, 106 S.Ct. at 1813. The Tennessee Supreme Court has held that the Tennessee Constitution provides no greater protection in these circumstances than was stated by the Court in Ciraolo. State v. Prier , 725 S.W.2d 667, 671 (Tenn. 1987).

In Florida v. Riley, the United States Supreme Court riled on Ciraolo and held that it was unreasonable for the defendant to expect that the marijuana growing in his partially open-roofed greenhouse was constitutionally protected from police observation by helicopter flying at an altitude of 400 feet. 488 U.S. 445, 450-

51, 109 S.Ct. 693, 697, 102 L.Ed.2d 835 (1989). The four-Justice plurality stated that

> that it is of obvious importance that the helicopter in this case was not violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondents normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

Id., 488 U.S. at 451-52,109 S.Ct. at 697.[3]

We conclude that under Ciraolo and Riley, Appellants had no reasonable expectation that the marijuana on their property was protected from observation by the police from a helicopter flying at an altitude of 300 feet. First, the police were operating the

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[3]In a separate concurring opinion, Justice O'Connor stated that the key inquiry is not the altitude of the aircraft, it is the reasonableness of the expectation of privacy. Riley 488 U.S. at 454, 109 S.Ct. at 699 (O'Connor, J., concurring). Justice O'Connor then stated that because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above and because the defendant had failed to introduce any evidence to the contrary, the defendant's expectation that his property was protected from aerial observation from an altitude of 400 feet was not reasonable. Id. 488 U.S. at 455, 109 S.Ct. at 699 (O'Connor, J., concurring).

helicopter at a permissible altitude.4 Second, there is nothing in the record to suggest that helicopter overflights at 300 feet are sufficiently rare in rural Wayne County so as to support Appellants' theory that they reasonably believed that their property would not be observed by helicopter. In fact, Ms. Ware testified at the suppression hearing that before the helicopter observation at issue here, she had already received notice from Champion Paper Company that helicopters would be in the area to spray during August and September. Further, Ms. Ware testified that part of the reason the marijuana was covered with cheesecloth was because in addition to the Champion helicopters, there might be "marijuana helicopter[s]" in the area. Third, there is no evidence in the record that the police helicopter interfered with Appellants' use of their property. Finally, there is no evidence in the record that the helicopter surveillance at an altitude of 300 feet caused any undue noise, or any wind, dust, or threat of injury. Under these circumstances, we conclude that the helicopter surveillance at 300 feet did not violate Appellants' rights under the Fourth Amendment or under Article 1, Section 7. 5 This issue is meritless.

4While Federal Aviation Administration regulations generally prohibit the flying of fixed-wing- aircraft below certain altitudes, helicopters may be operated lower than the minimum altitudes "if the operation is conducted without hazard to persons or property on the surface." 14 CFR § 91.119 (1994).

5We note that the only authority Appellants cite for the proposition that the helicopter surveillance at 300 feet was unconstitutional Is the unpublished Sixth Circuit opinion of United States v. Saltzman, 992 F.2d 1218, 1993 WL 100082 (6th Cir. 1993). However, that case is distinguishable because the court found that the helicopter had flown at an altitude of 125 to 150 feet and had disturbed both the defendant's family and the surrounding neighbors. Id. 1993 WL 100082, at 3.

III. SEARCH WARRANT

Appellants content that the search warrant was obtained for their property was tainted by the prior warntless enty onto their property by the police. We disagree.

A. Warrantless Entry

Initially, we note that the warntless entry of Appellant's property was improper.6 Unless it falls within a specifically established and well- delineated exception, a search conducted without a warrant is per se unreasonable. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) (citations omitted). One of these exceptions is "[a] warrantless search conducted pursuant to probable cause and exigent circumstances." State v.Moore, 949 S.W.2d 704, 706 (Tenn. Crim. App. 1997). However, "[t]he burden is on the State to show that exigent circumstances ma[d]e the search imperative." State v. Yeargan, 958 S.W.2d 626, 641 (Tenn. 1997).

It Is clear that the police had probable cause to believe that there was marijuana on Appellants' property. Trooper Peevehouse testified at the suppression hearing that while he was at an altitude

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6There is no dispute that the part of Appellants' property that contained the growing marijuana plants was "curtilage" rather than "open field." In State v. Jennette, the Tennessee Supreme Court held that police officers do not need a warrant to enter an open field and seize marijuana that they have observed by lawful helicopter surveillance (emphasis supplied). 708 S.W.2d 614, 618-21 (Tenn. 1986). However, the supreme court held in State v. Prier that absent exigent circumstances, police officers must have a warrant in order to enter curtilage and seize marijuana that they have observed by lawful helicopter surveillance. 725 S.W.2d 667, 671-72 (Tenn. 1987).

of 900 feet, he saw an uncovered plant which he recognized through training and experience as a marijuana plant. Peevehouse then went down to an altitude of 300 feet and confirmed that what he had seen was marijuana. Because Peevehouse had observed what he knew through training an experience to be marijuana, it is clear that the initial entry was supported by probable cause.

However, it is also clear that the State failed to meet its burden of showing that the initial entry was due to exigent circumstances. First, there is no evidence in the record that there was a danger that the evidence would be destroyed before a warrant could be obtained. Peevehouse testified that he never saw anyone who would have been in the position to destroy the marijuana plants he had observed. Agent Lawson also testified that he had not seen anyone attempt to destroy evidence and he had no reason to believe that anyone was about to destroy the evidence. As this Court has previously stated, generalized fears that someone may destroy evidence is insufficient to establish the existence of exigent circumstances. State v. Curtis, 964 S.W.2d 604, 610-11 (Tenn. Crim. App. 1997). Second, the record does not indicate that the initial entry was necessary for officer safety. Agent Callahan testified that, as the leader of the officer who initially entered the property, he had not received any information that Appellants were armed and dangerous. In addition, Agent Lawson also testified that he had received no information that Appellants had any weapons. Further, it is obvious that there could have been no threat to officer safety as long as the officers remained off of Appellants' property. Thus, we agree with Appellants that the initial entry of their

property was an unreasonable search under the Fourth Amendment and Article 1, Section 7.

B. Impermissible Taint

Although we agree with Appellants that the initial entry of their property was unlawful, we disagree that the warrant was tainted by the entry.

Although the exclusionary rule may operate to bar the admissibility of evidence directly or derivatively obtained from an unconstitutional search or seizure, it has long been recognized that evidence obtained by means genuinely independent of the constitutional violation is not subject to the exclusionary rule. See Wong Sun v. United States, 371 U.S. 471, 485-87, 83 S.Ct. 407, 416-17, 9 L.Ed.2d 441 (1963). "This 'independent source doctrine' rests upon the policy that 'while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." State v. Clark 844 S.W.2d 597, 600 (Tenn. 1992) (quoting Murray v. United States, 487 U.S. 533, 542, 108 S.Ct. 2529, 2535, 101 L.Ed.2d 472 (1988)). The Tennessee Supreme Court has stated that

> Pursuant to this doctrine, an unconstitutional entry does not compel exclusion of evidence found within a home if that evidence is subsequently discovered after execution of a valid warrant obtained on the basis of facts known entirely independent of the illegal entry. Further, even "plain view" evidence observed during the warrantless entry will not be excluded so long as (1) the evidence is later discovered during a search pursuant to a valid warrant, (2) this valid warrant was obtained without referenced to evidence uncovered during the illegal search, and (3) the government agents would have obtained the warrant even had they not made the illegal entry.

> In order for the subsequent warrant and search to be found genuinely independent of the prior unconstitutional entry, the...information obtained during the illegal entry may not have been presented to the issuing Magistrate.

Clark, 844 S.W. 2d at 600 (citations omitted).

We conclude that the evidence found during the search was admissible because it was discovered after the execution of a valid warrant obtained on the basis of facts known entirely independent of the initial unlawful entry. The search warrant affidavit in this case set forth the following grounds for a warrant:

> affiant has received information from Tennessee Highway Patrol Trooper Dennis Peevyhouse [sic] that on September 29, 1994, he observed marijuana growing on the premises belonging to William Dean Ware located at Route #4, Box 928, Waynesboro, Tennessee. The marijuana was approximately 100 feet from the house. Trooper Peevyhouse [sic] observed the marijuana while conducting an aerial search of Wayne County. Trooper Peevyhouse [sic] has been trained in the aerial detection of marijuana growing and has observed marijuana growing many times in the past that has lead [sic] to arrests and convictions. Furthermore, it has been the experience of your affiants that person [sic] who grow marijuana tend to keep marijuana, marijuana seeds, pictures and records in their residences.

In its letter of August 14, 1996, in which it denied the motion to suppress, the trial court found that the warrant in this case was supported by probable cause that resulted from the observation by helicopter. The trial court also found that the affiant was based solely on the aerial observations. Although not expressly stated, the trial court's ruling necessarily required a

finding that the warrant was not tainted by the initial entry onto Appellants' property.7

It is clear from the express terms of the affidavit that the grounds for the warrant contained therein came entirely from the observations of Trooper Peevehouse and not from anything observed by officers on the ground. Althought Appellants make much of the fact that Agent Tubbs reported to Peevehouse that he had observed marijuana when he made the warrantless entry onto Appellants' property, that fact is simply not a part of the affidavit. Thus, the magistrate who issued the warrant could not have considered anything observed by Tubbs or any of the other officers on the ground in deciding to issue the warrant. The affidavit stated that Peevehouse had special training and experience in spotting marijuana during aerial observations and that he had successfully detected marijuana from the air on many occasions. Furthermore, the affidavit stated that Peevehouse's information about the presence of marijuana on Appellants' property was based on his own direct, personal observations. Therefore, the affidavit, on its face, provided ample grounds for a neutral and detached magistrate to issue a warrant for Appellants' property.

Appellants' claim that Peevehouse's observations as recounted in the affidavit were not independent of the unlawful entry because Peevehouse directed Tubbs to enter the property and confirm his belief that he had seen marijuana. Essentially, Appellants contend that Peevehouse could not possibly have determined that marijuana was growing under the cheesecloth from

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7 Indeed, in an order dated October 9, 1997, the trial court stated that it had previously found that the warrant was not based on information obtained from the warrantless entry.

an altitude of 300 feet without the confirmation he received from Tubbs. However, Appellants' argument ignores the fact that Peevehouse expressly testified that he saw a marijuana plant that was not covered with cheesecloth and he was able to identify it as a marijuana plant by observing its color and texture and relying on his training and experience. It is true that Agent Callahan testified that he recalled that Peevehouse had directed Tubbs to the left of Appellants' residence to confirm the presence of marijuana. However, although Peevehouse testified that he told Tubbs that the marijuana was on the left, he specifically denied ever directing Tubbs to go to the spot to confirm the presence of marijuana. Further, although Tubbs testified that he had reported seeing marijuana, he specifically denied that he had been told to go to where the marijuana was or to confirm its presence. In addition, Agent Lawson also specifically denied that Tubbs had been directed by anyone to go to where Peevehouse had seen the marijuana. The trial court obviously resolved any conflicts in the evidence in favor of finding that Peevehouse was sure that he had seen marijuana and he did not need any confirmation. The evidence does not preponderate against this finding.

In short, we conclude that the warrant was issued based solely on the observations of Peevehouse that were completely independent of anything observed by the officers on the ground. In addition, because the warrant was obtained without any reference to evidence uncovered during the initial entry, because the evidence was subsequently discovered during the execution of a lawful warrant, and because the police would have obtained the warrant even if they had not made initial entry, the trial court correctly concluded that all evidence discovered during the search

of Appellants' property was admissible. See Clark, 844 S.W.2d at 600. This issue has no merit.

IV. SEARCH OF MORGAN'S PROPERTY

Appellants contend that the trial court should have suppressed the evidence found in the building owned by Morgan because the building was not covered by the warrant. We disagree.

When challenging the reasonableness of a search or seizure, the defendant has the burden of first establishing a legitimate expectation of privacy in the place or property which is searched. Rawlings v. Kentucky, 448 U.S. 98, 104-05, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Although relevant to the standing inquiry, an ownership interest in the property searched is not a prerequisite to establishing a legitimate expectation of privacy because on individual may posses a legitimate expectation of privacy in other person's residence. State v. Turnbill, 640 S.W.2d 40, 45 (Tenn. Crim. App. 1982). This Court has held that the following seven factors are applicable to the standing inquiry:

(1) property ownership;
(2) whether the defendant has a possessory interest in the thing seized;
(3) whether the defendant has a possessory interest in the place searched;
(4) whether he has a right to exclude others from that place;
(5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion;
(6) whether he took normal precautions to maintain his privacy; and
(7) whether he was legitimately on the premises.

State v. Oody, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991) (quoting United States v. Haydel, 649 F.2d 1152, 1154-55 (5th Cir. 1981)).

In reviewing the applicable factors, we conclude that Appellants failed to establish that they had a reasonable expectation of privacy in Morgan's building. It Is true that Appellants had a possessory interest in Morgan's building and they were legitimately entitled to use the building. Indeed, Ms. Ware testified that Morgan had given Appellants permission to use the building for storage in return for keeping the building in repair. It is also true that Appellants had manifested a subjective expectation that the building would remain free from governmental invasion and had taken normal precautions to maintain their privacy by keeping the building locked. However, we conclude that these factors are outweighed by the other factors which indicate that Appellants had no legitimate expectation of privacy in Morgan's building. First, it is undisputed that Morgan, and not Appellants, owned the building. In fact, Appellants did not have a lease or any other kind of written agreement that entitled them to use the property; their use was merely pursuant to a verbal agreement. Second, there is no indication in the record that Appellants ever claimed ownership of the property that was seized from Morgan's building. In fact, Ms. Ware specifically testified that she did not know who owned the marijuana growing equipment or the LSD that was found in the building. Third, and most importantly, there is no indication in the record that Appellants had the right to exclude others from Morgan's building. There is no indication that Appellants' agreement with Morgan gave them the exclusive right to use the building. Certainly, the record indicates that Morgan had a key to the building and nothing indicates that he could not have used the building anytime he was in the area. Further, there is nothing in the record to indicate that Morgan

could not have given his key to any number of people and also permitted them to use the building for storage. Under these circumstances, we conclude that Appellants did not, have a legitimate expectation of privacy in Morgan's building. This issue is meritless.9

V. DENIAL OF FULL PROBATION

Mr. Ware contends that the trial court erred when it failed to impose full probation for the sentence for his marijuana conviction. We disagree.

Under Tennessee law, a defendant is eligible for probation if the sentence imposed is eight years or less and further, the trial court is required to consider probation as a sentencing alternative for eligible defendants. Tenn. Code Ann. § 40-35-303(a)-(b) (1997). However, even though probation must be automatically considered, "the defendant is not automatically entitled to

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9We note that this Court held that evidence discovered under similar circumstances was admissible in State v. Brewer, 640 S.W.2d 33 (Tenn. Cdrn. App. 1982). In Brewer the officers who were executing a search warrant for the defendants'property wandered over an indistinct property line and discovered a marijuana patch and a partially constructed house that contained marijuana. This Court held that the search was reasonable under the circumstances because the officers had not strayed far from the defendants' property and further, the defendants had failed to establish a privacy interest in their neighbors property. Id, at 34-35. Similarly, Agent Lawson testified that even though a local officer had expressed the opinion that the building was not owned by Appellants, Lawson believed that it was part of their property or at least was connected with it because it was connected to one of Appellants' marijuana patches by a "well-worn path" that had marijuana cultivating equipment and cut marijuana stalks scattered along its entire length. (II 123-24) Thus, we conclude that, as was the search in Brewer, Lawson's search of Morgan's building was likewise reasonable under the circumstances.

probation as a matter of law." Tenn. Code Ann. § 40-35-303(b) (1997), Sentencing Commission Comments; State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). Indeed, a defendant seeking full probation bears the burden on appeal of showing that the sentence actually imposed is improper and that full probation will be in both the best interest of the defendant and the public. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995). When determining suitability for probation, the sentencing court considers the following factors: (1) the nature and circumstances of the criminal conduct involved; (2) the defendant's potential or lack of potential for rehabilitation, including the risk that, during the period of probation, the defendant will commit another crime; (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense; and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes. Tenn. Code Ann. §§ 40-35-210 (b)(4), 40-35-103(5), 40-35-103 (1)(B) (1997 & Supp. 1998); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); Bingham, 910 S.W.2d at 456.

As a Range I standard offender convicted of a Class E felony and sentenced to two years, Mr. Ware was presumed to be a favorable candidate to receive an alternative sentence for his marijuana conviction. Tenn. Code Ann. § 40-35-102(5) –(6) (1997). Indeed, Mr. Ware received an alternative sentence of seven months of confinement followed by one year and five months of probation. However, Mr. Ware contends that the trial court should have imposed probation for the entire two year period of his sentence.

The record indicates that in imposing the sentence for Mr. Ware's marijuana conviction, the trial court considered the fact that Mr. Ware had no previous record of criminal convictions and that manufacture of marijuana is not a violent crime. However, the trial court concluded that these factors were outweighed by other considerations. The trial court noted that the evidence presented during the sentencing hearing indicated that Mr. Ware had been involved in the manufacture and sale of marijuana for at least five years before he was caught. The trial court also noted that Mr. Ware's operation was well-planned and sophisticated and that Mr. Ware had supported himself, his wife, and their two children with the proceeds of his marijuana growing operation. Thus, the trial court concluded that full probation was not appropriate because the seriousness of the offense would be depreciated if the sentence did not include some period of confinement.

We conclude that the trial court properly denied full probation based on the seriousness of the offense. The general rule is that "[i]n order to deny an alternative sentence based on the seriousness of the offense, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," and the nature of the offense must outweigh all factors favoring a sentence other than confinement." Bingham, 910 S.W.2d at 455. We conclude that the circumstances of Mr. Ware's offense do not meet this standard. However, this Court has recognized that although the circumstances of the offense may not be sufficient in themselves to completely deny alternative sentencing, they may still be sufficient to deny full probation. See Id., at 456. This is the case here. The photographs, videotapes, and

documents seized from Appellants' home indicate that Mr. Ware was engaged in a well-organized marijuana growing and selling operation from at least 1989 until his arrest in 1994. Indeed, the record indicates that Mr. Ware had developed a fairly refined system for "cloning" and raising marijuana plants that were a cross between "M-39" and "Skunk #1" types of marijuana. In fact, Agent Callahan testified that Mr. Ware had the most sophisticated operation that he had ever seen and Callahan estimated that Mr. Ware had made up to $100,000.00 in one year through the marijuana operation. Further, the record indicates that Appellants had 153 marijuana plants on their property when it was searched on September 29 and 30, 1994. Under these circumstances, we agree with the trial court that some period of confinement was necessary in order to avoid depreciating the seriousness of the offense.

In short, Mr. Ware has simply failed to meet his burden of showing that the sentence actually imposed is improper and that full probation will be in both his own best interest and in the best interest of the public. See Id. Therefore, we conclude that a sentence of seven months of confinement followed by one year and five months of probation is entirely appropriate in this case. This issue has no merit.

According, the judgment of the trial court is AFFIRMED.

/S/_____
JERRY L. SMITH, JUDGE

CONCUR:
/S/_____
JOHN H. PEAY, JUDGE

/S/_____
DAVID H. WELLES, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE
AT NASHVILLE
JANUARY SESSION, 1999

STATE OF TENNESSEE,	) C.C.A. No. O1CO1-9803-CC-00129
Appellee,	)
	) NO. 10,579-83, 10,680-82
VS.	) BELOW
	)
WILLIAM D. WARE and VIRGINIA WARE,	) WAYNE COUNTY) AFFIRMED
	)
Appellant.	) (Direct Appeal)

JUDGMENT

Came the Appellants, William D. Ware and Virginia Ware, by counsel and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Circuit Court of Wayne County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

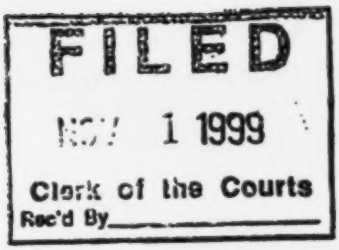
It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, and the case is remanded to the Circuit Court of Wayne County for execution of the judgment of that Court and for collection of costs accrued below. The Appellants bond shall remain in effect pending appeal with a twenty-five percent increase.

Costs of appeal will be paid by the Appellants, William D. Ware and Virginia Ware for which let execution issue.

Per Curiam

Smith, Peay, Welles

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



STATE OF TENNESSEE,	)	
	)	
APPELLEE	)	
	)	WAYNE COUNTY
v.	)	
	)	NO. O1CO1-9803-CC-00129
WILLIAM D. WARE AND	)	
VIRGINIA WARE,	)	
	)	
APPELLANTS	)	

ORDER

Upon consideration of the application for permission to appeal and the record before us, the application is denied.

PER CURIAM

II

IN THE CIRCUIT COURT OF WAYNE COUNTY, TENNESSEE

THE TWENTY-SECOND JUDICIAL DISTRICT

STATE OF TENNESSEE	:	
	:	
VS	:	CASES NO. 10,579-83,
	:	10,680-82.
GABRIEL WARE, VIRGINIA WARE, SUMMER WARE, WILLIAM D. WARE,	:	

FILED
MAR 25 1998
Clerk of the Courts
Rec'd By

TRANSCRIPT OF THE EVIDENCE

PRE-TRIAL MOTION TO SUPPRESS

VOLUME I

JULY 3, 1996

Before the Honorable, WILLIAM B. CAIN,

Circuit Judge.

APPEARANCES:

FOR THE STATE OF TENNESSEE:

MR. THOMAS M. BOTTOMS, DISTRICT ATTORNEY GENERAL
MR. JESSE DURHAM, ASST. DIST. ATTY. GEN.
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FOR THE PETITIONER:

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Dirthy McFall
CERTIFIED OFFICIAL CRIMINAL COURT REPORTER
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Nashville, Tennessee 37205

was to go to the back of the residence to see if anybody ran out. That's what he did and when he went by this marijuana, I guess he's supposed to close his eyes and say, "Oops, I didn't see that." Well, he didn't say that. He saw it and he said, "Yep, that's marijuana".

They secured the house, they made sure no one else was in there, they withdrew the people, and they went and got a search warrant. I think it's exactly what they should have done and we would ask the court to overrule their motion to suppress.

As I said, Mr. Durham is more experienced and educated in the law on these type cases and I'd ask to split our argument with him.

THE COURT: All right, Mr. Durham.

MR. DURHAM: Judge, I'm a little -- I've been here listening, but I have to admit that I'm a little bit confused. You know they say, they used to teach us in law school that join the issues, and I've been trying all day long to do that. What are we joining the issues for because I thought we might be here in connection with the suppression of the search warrant. But a lot of the things that was said and done, that apparently wasn't true. Apparently, I guess, we were more concerned about what went on before.

BEST AVAIL

Now, I think it's clear, you can go back and you can read State v. Layton, you can read State v. Jeannette, you can read State v. Pryor, and you can go to the federal cases and like all the way back to the case in 1986 of California v. Ciraolo -- I think I'm pronouncing that right, it's C-i-r-a-o-l-o, anyway, and all of those hold that what they were doing in connection with flying over is all right. They all had this been consistent since the early 80's saying that aerial surveillance is all right.

Now if you're flying over open fields and you find something, you can invade those open fields. The only thing that comes up, Judge, from all of these cases, if you spot something and you've got probable cause and if it's in the curtilage or if you think it's in the curtilage, then you have to go back to those things, of course that we talked about, the unreasonable search and seizures. And as the court knows that the way that a search that's unreasonable would be one without a warrant -- or you might have consent. If you have consent, it's not unreasonable -- or if you have probable cause connecting the circumstances. And so that's what these officers did. They had their probable cause. The moment the officers saw this marijuana when they were flying over it, which

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is where they could be -- is where, like I said, our Supreme Court and the United States Supreme Court has said you can. And I might say that in Florida v. Riley, they were down to four hundred feet. Four hundred feet flying over the curtilage, and the court says, "That's all right." You wouldn't expect there to be any flights and that you don't own that space above you. If it comes into where you're hovering down over the house and interfering with the privacy of the people -- looking in the windows and things like that - I think the courts wouldn't have found it probable.

THE COURT: Let me try to focus a little bit. The first information came from an anonymous somebody who called himself a tipster, some kind of a "Tennessee Tipster" or something.

MR. DURHAM: Yes, sir.

THE COURT: By way of an anonymous letter, describing essentially marijuana, guns, matters of that character. Obviously at that point, nobody had any probable cause to do anything.

MR. DURHAM: No, sir.

THE COURT: The next item in line is the fly over. In the fly over in which the agent in the helicopter, the Trooper flying the helicopter, the Trooper particularly, looks down from an area of

approximately nine hundred feet and views, at what he describes and identifies as a marijuana plant. Now, at that stage, you have probable cause to issue a warrant.

Now, tell me the law as it relates to what you can do to secure perishable property while you get such a warrant.

MR. DURHAM: Judge, there's a number of cases to where officers had got into position to observe and prevent the destruction of evidence, and that's all right. And even if you have to invade the curtilage, if you don't get something new from going on the curtilage without a warrant or without consent, that helps you with your probable cause. If you already have your probable cause -- Murray for instance, U.S. v. Murray or Murray v. U.S is I believe the way it is cited -- they were already in the warehouse if the court remembers. They were already in the warehouse, but they had independent probable cause and they were out getting the search warrant and the U.S. Supreme Court said that the fact that they had gone in there -- and they say to preserve -- to keep anything from being destroyed because they knew they were there and so if they left, the evidence would be destroyed -- so the court said, "Well, certainly they can stay there." And

even if it had been seized, if you had a warrant that was independent of the information that was obtained when you entered the warehouse, that you reseize, or however you want to call it they said, that is perfectly all right. That's Murray.

In Dunn there was an invasion of the curtilage, and again in State v. Dunn the court says, "If the independent probable cause, i.e. the flying over and seeing the marijuana, which is already done, the fact that the curtilage is invaded to preserve or protect the evidence, does not change the fact that you have a probable cause and you can go and get it, as long as you don't make a search until after you get it. They said that you're not going on there to make a search and that's what these officers said, if you recall, your honor. They said they were going up there to one, try to get consent, and secondly, was the safety factor and to secure the premises, in which they had a right to do under all the cases.

In Ciraolo, your honor, they had the big high fences. There was no question that it was connected to the house and was inside and they had to get a plane to go up to go over to where they could see it. They knew it was there or they had very good information that it was there, but they didn't think

they had enough probable cause and so they sent a plane up. The plane flew over and so then they moved up and secured the area while they went and got the search warrant.

The California court now suppressed that, but it went up to the U.S. Supreme Court and they said, "No, the probable cause was obtained from where they could be", that is in the air. And they also stated that if they were standing in an open field they could see it. And they also said that you could normally approach the house -- that you could normally approach the front door, for instance, or go around the back if it was a case to where you were looking to see if someone else was there.

Now, I would think, Judge, that they had the probable cause and they were going to seek, and they did try to get consent, failed in that, they went and got their warrant. If you see from the affidavit they use as the probable cause what they had observed from the air and what they observed from where they had a right to be.

THE COURT: I need the search warrant and the affidavit. It's an exhibit.

MR. DURHAM: Yes, sir, is this it?

I would think it would be an arguable

position, again from the law, that when they were approaching the house, whatever they saw -- I believe it was Agent Tubbs, as he was going up to the house, as the General says, he's not required to cover up his eyes or whatever. He's walking up towards the house, which he has a right to, and he sees something.

Now, after they got to the house and they found a belligerent person -- this person is there and a belligerent person who is trying to drive them off, the officers would have been absolutely stupid and would have been subject to someone considered malfeasance if they hadn't secured it because certainly if they had left, when they come back there wouldn't have been anything there for them to see. There wouldn't have been anything for them to get. So once they had a person there that was belligerent and saying, "Get off my property. I'm growing herbs and you're violating my rights", there was actually circumstances. So it would be my position that they could have searched then, but again, these officers did what they had been taught to do -- to go get a warrant and that's what they did.

Judge I would have a number of cases that I could submit to the court. I don't have all of them here today.

THE COURT: All right, counselor.

FILED

JUL 1 2 1996

TIME _____ M

CIRCUIT COURT CLERK
WAYNE COUNTY, TENN.

IN THE CIRCUIT COURT FOR WAYNE COUNTY, TENNESSEE

AT WAYNESBORO

STATE OF TENNESSEE	)	
	)	
VERSUS	)	DOCKET NO. 10679-10683
	)	
WILLIAM WARE,	)	
VIRGINIA WARE,	)	
SUMMER WARE, and	)	
GABRIEL WARE,	)	
	)	
Defendants.	)	

SUPPLEMENTAL MOTION TO SUPPRESS

Come now the Defendants and supplement their Motion to Suppress made in open court on July 3, 1996 as follows:

1. Defendants move the Court to suppress any and all evidence seized from their residence and persons on or about September 29 and 30, 1994, by agents of the State of Tennessee for the following reasons:

a. The initial entry on their property was made without a search warrant, without probable cause, without exigent circumstances, and without any other lawful reason, excuse, or justification, all in violation of their rights against unreasonable searches and seizures under the Fourth Amendment to the United States Consultation and analogous provisions of the Tennessee Constitution;

b. The search warrant ultimately used to continue the search and seizure of their premises the afternoon of September 29, 1994, was based on information from Trooper Peevyhouse which was "confirmed" in the initial intrusion onto the Wares' premises by one or more agents of the State of Tennessee, and thus the search warrant is "tainted";

c. The storage house/Morgan residence was not included in the premises to be searched with the search warrant, yet was forcibly entered without a search warrant, consent, exigent circumstances, or other legal excuse, justification, or cause by special agent Jim Lawson with the full knowledge that said residence was not on the Ware premises and was thus not covered by the search warrant.

d. Flying over Defendants' property at a height of 300 feet was a violation of their rights against unreasonable searches and seizures.

For the same reasons set forth above, Defendants move the Court to suppress any and all statements given by them as a result of the illegal search and seizure set forth above as well as their illegal arrest resulting during said seizures.

This the 11th day of July, 1996.

COLLEY & COLLEY

By:/s/_____
JOHN S. COLLEY, III
BPR # 12029
Counsel for Defendants
P.O. Box 1476
Columbia, TN 38402-1476
(931) 388-8564

CERTIFICATE OF SERVICE

I, John S. Colley, III, hereby certify that I have sent a true and exact copy of the foregoing Motion to Mr. Mike Bottoms, District Attorney General, P.O. Box 459, Lawrenceburg, Tennessee 38464-0459 by first class mail, postage prepaid, this the 11th day of July, 1996.

__/S/_____
JOHN S. COLLEY, III

IN THE CIRCUIT COURT FOR WAYNE COUNTY, TENNESSEE

STATE OF TENNESSEE	)
	) Dockets 10,579,
versus	) 10,582, 10,583,
	) 10,680, 10,681,
WILLIAM DEAN WARE, et al.	) 10,682

RESPONSE TO MOTION TO SUPPRESS

Comes the State of Tennessee through the Office of the District Attorney General for the 22nd Judicial District, and submits to the Court that the Defendant's Motion To Suppress should be denied.

It is well established in both Federal and State Court that observations made from flights over a person's property in an unintrusive manner is not a violation of the Fourth Amendment protection of the Constitution. This was so stated in State v. Prier, 725 S.W.3d 667, and in California v. Ciraolo, 476 U S 207.

The observation of contraband (marijuana) gives rise to probable cause for further search and possible seizure. However, if the contraband is within a residence or the curtilage of the residence, a warrant must be secured, consent obtained from the appropriate person, or exigent circumstances must exist before the officers may proceed with their search and seizure.

Here the officers saw the marijuana from the air as they flew over the Ware property at about 900 to 1100 feet. This was certainly not intrusive. They then had probable cause to obtain a warrant, or they could attempt to secure consent from the owner. They did attempt to get consent, failing in that they obtained a search warrant.

The officers in the helicopter directed the officers on the ground to the Ware property, not to search, but to provide security to the officers and to prevent the destruction of the evidence. The Officers did not obtain any evidence or information to be used in a probable cause affidavit for a warrant as a result of going on the property.

Miss Ware, a daughter, and Mrs. Ware, the mother, were located at the house. Permission to search was sought from Mrs. Ware, this was rejected. The decision was made to obtain a warrant prior to the search for and seizure of the evidence. The probable cause for this warrant came from the observation from the air, not from anything gained from the agents going physically on to the Ware property. This procedure was approved in Murray v. U.S., 487 US 533, and in US v. Johnson, 8994 F2D 1153, 1157, that "It does not matter that officers first trespass upon property that is obviously curtilage...while investigating a tip, as long as the incriminating observation themselves take place outside the protected curtilage." Here the incriminating observations

were made before the officers entered the protected curtilage, and a proper warrant obtained before seizure of the contraband and other evidence.

There was a building, used by the Ware's for storage and other things, which belonged to someone else. It may be argued that it was outside the curtilage, and hence not covered by the warrant. However, there was a trail of evidence that led up to the building which presented overwhelming probable cause that the building was being used in ongoing illegal activities, and with exigent circumstances, the building not being occupied, justified the search of the building and the seizure of the contraband found.

It could also be argued that the Wares gave up any legitimate expectation of privacy in the things they put in the house, because others had access to the house, and the Wares did not reside there. This was essentially the reasoning the Court had in Matthews v. State, 805 S.W.2D 776.

The search and seizure in this case was conducted in a proper manner, in accordance with Constitutional and Statutory law.

The Motion to Suppress should, therefore, be denied.

Respectfully submitted

/S/_____
DISTRICT ATTORNEY GENERAL

A copy of this Response has been furnished to the Honorable John Colley, Columbia, Tennessee.

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COLUMBIA. TENNESSEE 38402-0413
615 380-3325

WILLIAM B. CAIN
CIRCUIT JUDGE
STATE OF TENNESSEE
TWENTY-SECOND JUE)ICIAL DISTRICT, DIVISION 11

FILED
AUG 1 5 1996

SERVING GILES,
LAWRENCE,MAURY
AND WAYNE COUNTIES

August 14, 1996

Mr. John S. Colley III
Colley and Colley
P.0 "Box 1476
Columbia- TN 38402-1476

Mr. Jesse Durham
Assistant District Attorney General
P.O. Box 1619
Columbia, TN 38402-1619

Re: State v. William Dean Ware, et al
Wayne Circuit Nos. 10,579,
10,582, 10,583, 10,680, 10,681,
10,682

Gentlemen:.

In this case the aerial observations of growing marijuana within the curtilage of the residence was made from helicopter in open air space 900 to 1100 feet above the ground. These naked eye observations from open air space created probable cause for the issuance of a search warrant. California v. Ciraolo, 90 L.Ed.2d 210 (1986); State v. Prier, 725 S.W.2d 667, 671.

Officers on the ground, subsequent to the aerial observations, sought and were refused consent to search the Ware premises. The aerial observations, however, were the basis of the probable cause affidavit and the issuance of the search warrant which was used to search the premises.

The motion to suppress will be denied, and Mr. Durham will prepare an appropriate order and submit same for approval.

With every good wish, I remain

Sincerely yours,
/s/
William B. Cain

WBC/mt
cc: Circuit Court Clerk

IN THE CIRCUIT COURT FOR WAYNE COUNTY,
TENNESSEE
AT WAYNESBORO

STATE OF TENNESSEE	)	
	)	
VERSUS	)	DOCKET NOS. 10581,
	)	10582, 10583
WILLIAM WARE and	)	
VIRGINIA WARE,	)	
	)	
Defendants.	)	

FILED

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CIRCUIT COURT CLERK WAYNE COUNTY, TENN

ORDER

This cause came on to be heard on August 13, 1997, upon the Defendants' petitions to enter pleas of guilty pursuant to Rule 37(b)(2)(i).

Pursuant to Rule 11, Tennessee Rules of Criminal Procedure, the Court finds that the Defendants' pleas are knowingly and voluntarily entered, and the Court accepts same. The Defendant William Dean Ware is therefore found guilty of Possession of a Schedule VI Controlled Substance for Resale in Case Number 10583, and Possession of a Schedule I Controlled Substance for Resale

in Case Number 10582; the sentence imposed totals eight (8) years, as is more particularly stated in the judgments of conviction entered this day,

The Defendant Virginia Ware is found guilty of Possession of a Schedule VI Controlled Substance for Resale in case number 10581, and the sentence imposed is two (2) years, as is more particularly stated in the judgment of conviction entered this day in her case.

With the consent of the Court and the consent of the District Attorney, these Defendants' pleas explicitly reserve the right to appeal certain certified questions of law that are dispositive of their cases, all alleging violations of these defendants guarantees against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution and analogous provisions of the Tennessee Constitution, to wit:

1. Defendants complained of, and asked the Court to exclude all evidence from, the initial entry on their property made without a search warrant, without probable cause, without exigent circumstances, and without any other lawful reason, excuse, or justification. On March 4, 1997, the Court denied the Defendants' motion, finding the search warrant was issued on good and sufficient probable cause.

2 The Defendants complained of, and asked the Court to exclude all evidence seized under, the search

warrant ultimately used to continue the search and seizure of their premises the afternoon of September 29, 1994, which was based on information from Trooper Peevyhouse which was "confirmed" in the initial intrusion into the Wares' premises by one or more agents of the State of Tennessee, allegedly "tainting" the search warrant. This ground for suppression was likewise denied by the Court on March 4, 1997

3. The Defendants complained of, and asked the Court to suppress all evidence seized from, the building owned by Mr. Morgan which was not included in the premises to be searched with the search warrant, but which was forcibly entered without a search warrant, consent, exigent circumstances, or other legal excuse, justification or cause by special agent Jim Lawson, with the full knowledge that said resident was not on the Ware premises and was thus not covered by the search warrant. The Court denied this ground of the Defendants' Motion to Suppress as well on March 4, 1997.

4. Defendants complained of, and asked the Court to exclude all evidence seized as a derivative of, the State flying over Defendants' property at a flight of 300 feet, alleging said over-flights to be a violation of their rights against unreasonable searches and seizures. This ground was also denied by the Court on March 4, 1997.

Defendants, the State, and the Court expressly agree that the foregoing issues are dispositive of these cases as follows:

a) Issues 1, 2 and 4 are each dispositive of the charges against William Dean Ware in Docket Numbers 10582 and 10583. Issue No. 3 is dispositive of the charge in Docket Number 10582 against William Dean Ware.

b) Issues 2, and 4 are each dispositive of the charges against Virginia Ware in Docket Number 1058.

Defendants have been placed on probation pending the outcome of the appeal in these matters. These cases shall be consolidated on appeal to the Tennessee Court of Criminal Appeals at Nashville. Defendant William Dean Ware shall serve his one year incarceration within thirty (30) days of the exhaustion of this appeal, and shall remain on supervised probation during the appeals process

It is so ORDERED this the 9th day of October, 1997.

/s/_____
HONORABLE ROBERT L. JONES
CIRCUIT JUDGE

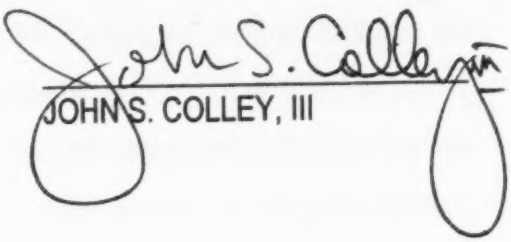
APPROVED FOR EN'FRY:

/s/_____
JIM WHITE, Asst. D.A.

/s/_____
JOHN S. COLLEY, III, for Defendants

CERTIFICATE OF SERVICE

I, John S. Colley, III, hereby certify that I have sent a true and exact copy of the foregoing Petition For A Writ of Certiorari, to Mr. Daryl J. Brand, Associate Solicitor General, Tennessee Attorney General's Office, 425 Fifth Avenue North, Nashville, Tennessee 37243, by first-class mail, postage prepaid, this the 31 day of January, 2000.



JOHN S. COLLEY, III